UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POLYTECHNIC INSTITUTE OF
NEW YORK UNIVERSITY,
Employer

and

Case No. 29-RC-12054

INTERNATIONAL UNION, UAW,
Petitioner

OPPOSITION TO EMPLOYER'S CONDITIONAL REQUEST FOR REVIEW

I. INTRODUCTION

The Petitioner, the International Union, UAW, seeks to represent a unit of graduate student employees employed by Polytechnic Institution of New York University ("the Employer"). The unit sought includes three classifications of student employees: Teaching Assistants ("TAs"), Research Assistants ("RAs") and Graduate Assistants ("GAs"). TAs and RAs are doctoral students who receive a stipend and other benefits in exchange for performing teaching duties or research work, respectively. Doctoral students commonly work as TAs during the first year of their Ph.D. studies before becoming RAs. GAs are hourly-paid masters' students who perform services for the University, often working together on teams with RAs.

The Regional Director dismissed this petition on the authority of Brown University, 342 NLRB 483 (2004), finding that the student employees in the petitioned for unit are graduate assistants whose right to organize was taken from them in Brown. The Regional Director found that, but for the Brown decision, the TAs and GAs would have

the right to organize, rejecting the Employer's alternative argument that these student employees should be denied the right to form a union because they are temporary employees. Petitioner has filed a Request for Review of the Regional Director's decision, asking the Board to reconsider and overrule Brown. The Employer has filed a "Conditional Request for Review," asking that, if the Board grants the Union's Request for Review, the Board should also consider its argument that TAs and GAs are temporary employees who should be denied the right to form a union. This memorandum is submitted in opposition to the Employer's Conditional Request for Review.

II. FACTS

The facts relevant to the employment of GAs and TAs are set out in the Regional Director's Decision and will not be discussed in detail in this memorandum. Notably, he found that a majority of GAs and all TAs work for at least two semesters, the equivalent of a full academic year (Dec. 8, fn. 12; Dec. 10).[1] GAs and TAs generally work 20 hours per week (Dec. 7, 9). Both GAs and TAs perform work that is related to their education (Dec. 5-6, 10). The Regional Director also found that the work of GAs and TAs provides benefits to the Employer (Dec. 14). The Employer does not dispute any of these findings.

III. ARGUMENT

Citing Kansas City Repertory Theatre, Inc., 356 NLRB No. 28 (2010), the Regional Director held that the limited duration of these student-employees' employment is not a

[1] The Regional Director's Decision order is cited herein as "Dec" followed by the page number.

basis to deprive them of the right to engage in collective bargaining (Dec. 18). The Board in Kansas City Repertory rejected the argument that temporary employees are excluded from the right to organize under the Act, noting that "no such exclusion appears in the definition of employee or elsewhere in the Act. Sl. op.at 1. Accordingly, the Regional Director followed controlling precedent when he rejected the Employer's argument that Gas or TAs cannot form a union because their employment is temporary.

In response, the Employer cites Trump Taj Mahal Casino, 306 NLRB 294 (2002), for the proposition that only employees who have a "real continuing interest in the terms and conditions" of their employment should be permitted to participate in an NLRB election. This is, in fact, the standard applied by the Board in both Trump Taj Mahal and Kansas City Repertory. It is a liberal, inclusive standard. Trump Taj Mahal concerned the eligibility formula to determine whether irregularly scheduled employees would be permitted to vote in a unit of technicians in the entertainment industry. The Board held that employees categorized by the employer as "casual" employees should be permitted to vote, provided they worked an average of 4 hours per week over a calendar quarter. In Kansas City Repertory, the Board held that employees who worked 5 days over the course of a year had a sufficient interest in their employment to form a union. These decisions thus support the Regional Director's conclusion.

The GAs and TAs have a much greater interest in their jobs than the employees at issue in Trump Taj Mahal or Kansas City Repertory. They work 10 to 20 hours per week over a 9 month period. Both classes of employees have an interest in their jobs based upon its relationship to their education and future careers. The work of the TAs is related to their field of study and helps to prepare them for further studies. The

Employer designed the GSET Program in order to ensure that the work of GAs is of interest to the student workers and beneficial to their long-term career plans. The majority of the student employees remain in their jobs for at least two semesters. TAs regularly and routinely move on to positions with the Employer as RAs. It is "not unusual" for a GA to become a PhD student and an RA. GAs regularly work together with RAs. Based upon these factors, TA's and GA's have a greater "continuing interest" in their employment than the "casuals" found eligible to vote in Trump Taj Mahal or the intermittent musicians in Kansas City Repertory.

The Employer relies principally on two decisions in which the Board denied student workers the right to engage in collective bargaining on the ground that they lacked sufficient interest in their employment to warrant representation. Saga Food Service of California, Inc., 212 NLRB 786 (1974), involved students working in a college cafeteria. After a detailed discussion of how the terms and conditions of these student employees differed from those of other cafeteria employees, so that they should be excluded from an overall unit of cafeteria employees, the Board, in a footnote with little explanation, held that they were not entitled to bargain in a separate unit. The Board expounded upon the issue in San Francisco Art Institute, 226 NLRB 1251 (1976), a case involving that students at an art school who worked as janitors at the school. The student janitors were appointed on a semester basis, but frequently left the job before the semester ended. The Board found that, because of the high turnover, the composition of the unit would change substantially in just the weeks between the filing of a petition and the conduct of an election. No student had ever continued as a janitor beyond graduation. The jobs bore no relationship to the students' studies. Thus, the

Board concluded that the student janitors did not "manifest a sufficient interest in their conditions of employment to warrant representation." 226 NLRB at 1252. Citing Saga, the Board emphasized the "very tenuous secondary interest that these students have in their part-time employment." Ibid.

The very factors relied upon by the Board in San Francisco Art show that these cases do not apply to the TAs and GAs at issue in this case. The TAs and GAs generally work for two semesters, rather than just a few weeks like the students in San Francisco Art. The work of the TAs and GAs is related to their future endeavors. Indeed, the GSET program is designed to ensure that the work performed by the students workers is related to their studies and of interest to the student employees. Thus, these employees have a much greater interest in their jobs.

In summary, these student-employees have a "real continuing interest in the terms and conditions" of their employment. Therefore, this case is distinguishable for Saga and San Francisco Art Institute. To the extent that those two cases rely upon the mere temporary nature of the jobs, those cases cannot be reconciled with Kansas City Repertory Theatre. To the extent that those cases rely upon the students perceived lack of interest in their jobs, the cases are readily distinguishable. Accordingly the GAs and TAs should be permitted to decide whether to engage in collective bargaining with respect to that employment.

IV. CONCLUSION

The Regional Director's decision with respect to the alleged temporary employee status of GAs and TAs is consistent with controlling precedent. Therefore, there is no reason to grant the Employer's Conditional Request for Review.

RESPECTFULLY SUBMITTED,
THE PETITIONER

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CERTIFICATE OF SERVICE

This hereby certifies that the foregoing Opposition to Employer's Conditional Request for Review was electronically mailed, on this 20th day of September 2011 to all counsel of record as follows:

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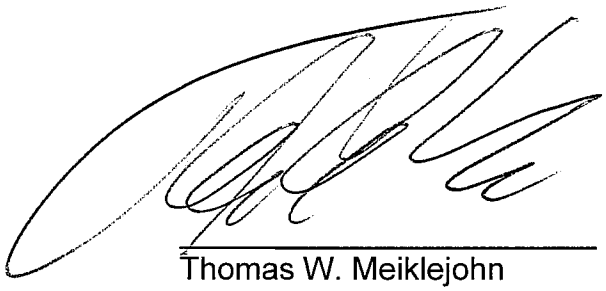

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